Sri Palmar Development & Construction Sdn Bhd v Juruukur Perunding Services Sdn Bhd (No 2)

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22–1536 OF 2002
LEE SWEE SENG JC
26 NOVEMBER 2010

Contract — Breach — Action for damages — Oral agreement of lump sum fee for title survey works for project — Defendant denied existence of oral agreement — Whether plaintiff had proven on balance of probability existence of oral agreement — Whether plaintiff entitled to damages for repudiatory breach of oral agreement — Whether defendant was released from its obligation to carry out title survey works, because fees to Land Surveyor's Board was not paid within reasonable time

The plaintiff, a housing developer embarked on a joint venture project ('the project') with the Selangor State Secretariat to construct and develop a special low-cost housing programme. The plaintiff claimed that there was an oral agreement of a lump sum fee which was originally RM100,000 and later revised to RM130,000 for the title survey works for the project. According to the managing director ('the MD') of the plaintiff company, the chairman of the defendant, a close friend, had approached him and persuaded him to appoint the defendant to carry out the survey works for the project. The MD also alleged that the defendant's chairman, agreed to a lump sum fee of RM100,000 for all the survey works for the alleged project, which was later revised to RM130,000. The defendant maintained that there was no agreement as contended by the plaintiff. The chairman of the defendant denied that it was he who approached the MD for the survey work. Instead the chairman claimed that the MD had approached him and requested that the defendant extend a quotation of the survey works to be done for the project, which he had done by the defendant's letter dated 4 September 1987. By way of the said letter the defendant had submitted the cost estimate for the preliminary survey and the subsequent title surveys, which had amounted to a total of RM251,735. This was the defendant's version of events. The plaintiff commenced an action for repudiatory breach of the oral agreement on fees and claimed damages. The plaintiff maintained that it had not accepted the quotation submitted by way of the defendant's letter dated 4 September 1987 because it had an oral agreement with the defendant for a lump sum fee of RM130,000. The defendant insisted that there was a quotation first given in 4 September 1987 and later revised downward and reclarified with the defendant but denied the oral agreement of RM130,000 as the title survey fees. It was the defendant's contention that as the licensed land surveyor, it could not carry out the title survey works until the plaintiff had deposited the prescribed fees with the Land Surveyor's Board ('the

board') as required by the law ie the Act and Regulations. The defendant thus argued that, as the plaintiff did not deposit the prescribed fees with the board at the material times, the defendant was unable to carry out the title survey. The defendant further submitted that there was no evidence in all the letters between the parties of the alleged oral agreement of RM130,000 as the title survey fees.

Held, dismissing the plaintiff's claim with no order as to costs:

(1) There were no express statements of the agreed title survey fee of RM130,000 in all the letters exchanged between the parties with the exception of the defendant's letter of 23 November 1995, which the defendant admitted was erroneously prepared. The court found that this letter was not so much a Freudian slip as an aberration in the vast array of letters alluding to the fees as prescribed and quoted. It was also noted that this critical and crucial letter which was said to evidence the oral agreement of RM130,000 as being the overall fees for survey works was never referred to at all in the subsequent letters of both the plaintiff and defendant. This could only mean that the parties did not intend the said letter to bear the meaning of an agreed fees of RM130,000 and hence no referral was made to it by the plaintiff. In addition, if there was such an agreement on RM130,000 as fees to the board, this was not complied with within a reasonable time. There was no payment of RM130,000 made by the plaintiff to the board until some five years later when it issued a cheque for the sum of RM200,056. As there was an earlier payment of RM19,189 standing to the credit of the plaintiff, this together with the sum of RM200,056 would make the total of RM219,245 as per the quote of the defendant vide its letter dated 23 February 1990. Further in the letter of demand from the plaintiff's solicitors to the defendant there was no reference made to the so-called crucial piece of evidence, ie the letter of 23 November 1995. Thus, based on the totality of the evidence, the plaintiff had failed to prove on a balance of probability that there was an agreement on RM130,000 as the lump sum survey fees (see paras 30, 33–34, 41, 51–52 & 67).

(2) Even if there was an agreement reached on a lump sum survey fee of RM130,000, the condition of the payment of the RM130,000 to the board was not fulfilled within a reasonable time with the consequence that the defendant was released from its obligation to carry out the title survey works, both because the said sum was not deposited with the board and that the agreement on fees was understood to be acted upon timeously. In the circumstances, the alleged repudiatory breach of contract by the plaintiff was misconceived as there was no contract in existence for the defendant to breach (see paras 41 & 47).

(3) The defendant refused to carry out the title survey work until and unless the plaintiff had deposited the revised sum of RM603,781.92 and at the same time, the defendant would not resign and issue the letter of release to the plaintiff to appoint another surveyor. This showed some element of self interest and bad faith on the part of the defendant. Being a professional, the proper conduct would have been to discharge oneself if one's client cannot agree on the fees. The defendant's conduct of not agreeing to be discharged had been unreasonable in the circumstances and as such the sum of RM83,658.37 deposited with the court including interest, if any, was to be refunded to the plaintiff in full (see paras 53 & 56).

[Bahasa Malaysia summary

Plaintif, pemaju perumahan memulakan projek usahasama ('projek ') dengan Setiausaha Kerajaan Negeri Selangor untuk membina dan memajukan sebuah program perumahan kos rendah yang istimewa. Plaintif mendakwa bahawa terdapat perjanjian lisan tentang fi sekaligus yang pada asalnya adalah RM100,000 dan kemudian disemak kepada RM130,000 untuk kerja mengukur hak milik untuk projek tersebut. Menurut pengarah urusan ('PU') syarikat plaintif, pengerusi defendan, seorang rakan yang rapat telah berjumpa dengannya dan memujuknya untuk melantik defendan melakukan kerja-kerja mengukur untuk projek tersebut. PU tersebut juga mendakwa bahawa pengerusi defendan juga bersetuju kepada fi sekaligus sebanyak RM100,000 untuk semua kerja-kerja mengukur untuk projek yang didakwa, yang kemudiannya disemak kepada RM130,000. Defendan mengekalkan bahawa tidak ada perjanjian seperti yang dinyatakan oleh plaintif. Pengerusi defendan menafikan bahawa dia yang berjumpa dengan PU untuk kerja mengukur. Sebaliknya pengerusi menyatakan bahawa PU telah berjumpa dengannya dan memohon bahawa defendan memberikan sebut harga kerja-kerja mengukur untuk dilakukan untuk projek tersebut, yang dibuatnya melalui surat defendan yang bertarikh 4 September 1987. Melalui surat tersebut, defendan telah mengemukakan kos anggaran untuk pengukuran awal dan pengukuran hak milik kemudian, yang membawa kepada jumlah RM251,735. Ini adalah versi kejadian defendan. Plaintif mengekalkan bahawa ia tidak menerima sebut harga yang diberikan melalui surat defendan yang bertarikh 4 September 1987 kerana ia telah mengadakan perjanjian lisan dengan defendan untuk fi sekaligus sebanyak RM130,000. Defendan menegaskan bahawa terdapat sebut harga yang diberikan dahulu pada 4 September 1987 dan kemudian disemak menurun dan dijelaskan semula dengan defendan tetapi menafikan perjanjian lisan RM130,000 sebagai fi pengukuran hak milik. Ia adalah hujahan defendan bahawa sebagai juruukur tanah berlesen, ia tidak boleh menjalankan kerja-kerja mengukur tanah sehingga plaintif telah mendepositkan fi yang dinyatakan dengan Lembaga Juruukur Tanah ('Lembaga') seperti yang diperlukan di bawah undang-undang iaitu Akta dan Peraturan. Defendan oleh itu menghujahkan bahawa, oleh sebab plaintif tidak mendepositkan fi yang

dinyatakan dengan Lembaga pada masa material, defendan tidak boleh menjalankan kerja pengukuran hak milik. Defendan selanjutnya menghujahkan bahawa tidak ada keterangan di dalam kesemua surat di antara pihak-pihak mengenai perjanjian lisan yang didakwa mengenai RM130,000 sebagai fi juruukur hak milik.

Diputuskan, menolak tuntutan plaintif tanpa perintah untuk kos:

(1) Tidak ada penyataan secara langsung mengenai fi pengukuran hak milik yang dipersetujui sebanyak RM130,000 di dalam kesemua surat yang berbalas di antara pihak-pihak dengan pengecualian kepada surat defendan yang bertarikh 23 November 1995, yang defendan mengakui telah disediakan secara salah. Mahkamah mendapati bahawa surat ini tidak seperti *Freudian slip* sebagai penyimpangan dari kumpulan surat-surat yang secara luas menyentuh mengenai fi seperti yang dinyatakan dan disebut. Ia juga dilihat bahawa surat yang kritikal dan penting yang dikatakan sebagai keterangan kepada perjanjian lisan RM130,000 sebagai fi keseluruhan untuk kerja-kerja pengukuran tidak pernah dirujuk langsung di dalam surat-menyurat yang kemudian oleh plaintif dan defendan. Ini hanya boleh membawa maksud bahawa pihak-pihak tidak meniatkan bahawa surat tersebut untuk membawa maksud fi yang dipersetujui sebanyak RM130,000 dan oleh itu tidak ada rujukan dibuat terhadapnya oleh plaintif. Tambahan, jika terdapat perjanjian sedemikian bagi RM130,000 sebagai fi kepada Lembaga, ini tidak dipatuhi dalam tempoh masa yang munasabah. Tidak ada bayaran sebanyak RM130,000 dibuat oleh plaintif kepada Lembaga sehingga lima tahun kemudian apabila ia mengeluarkan cek bernilai RM200,056. Oleh kerana terdapat bayaran terdahulu sebanyak RM19,189 sebagai kredit plaintif, ini bersama-sama dengan jumlah sebanyak RM200,056 akan menjadi jumlah sebanyak RM219,245 seperti sebut harga defendan melalui suratnya yang bertarikh 23 Februari 1990. Selanjutnya di dalam surat tuntutan daripada peguamcara plaintif kepada defendan tidak ada rujukan dibuat kepada keterangan yang dikatakan sangat penting itu, iaitu surat bertarikh 23 November 1995. Oleh itu, berdasarkan kepada keseluruhan keterangan, plaintif telah gagal untuk membuktikan atas imbangan kebarangkalian bahawa terdapat perjanjian untuk RM130,000 sebagai fi sekaligus pengukuran (lihat perenggan 30, 33–34, 41, 51–52 & 67).

(2) Walaupun terdapat perjanjian yang dicapai bagi jumlah fi sekaligus pengukuran sebanyak RM130,000, syarat pembayaran jumlah RM130,000 kepada Lembaga tidak dipenuhi dalam tempoh yang munasabah dengan akibat bahawa defendan telah dilepaskan daripada tanggungjawabnya untuk menjalankan kerja-kerja pengukuran hak milik, kedua-duanya kerana jumlah tersebut tidak didepositkan dengan Lembaga dan perjanjian untuk fi difahami untuk dibayar dalam tempoh

yang ditetapkan. Dalam keadaan ini, kemungkiran kontrak penolakan yang didakwa oleh plaintif adalah disalah tanggap dan tidak ada kontrak yang wujud untuk defendan mungkiri (lihat perenggan 41 & 47).

(3) Defendan enggan melaksanakan kerja-kerja pengukuran hak milik sehingga dan kecuali plaintif telah mendepositkan jumlah yang disemak RM603,781.92 dan pada masa yang sama, defendan tidak akan melepaskan kerja tersebut dan mengeluarkan surat pelepasan kepada plaintif untuk melantik juruukur yang lain. Ini menunjukkan elemen mementingkan diri dan niat jahat oleh defendan. Sebagai profesional, tindakan yang wajar adalah untuk melepaskan diri jika pelanggan tidak boleh bersetuju dengan fi. Tindakan defendan tidak menyetujui untuk dilepaskan menjadi tidak munasabah dalam hal keadaan tersebut dan oleh itu jumlah sebanyak RM83,658.37 yang didepositkan dengan mahkamah termasuk faedah, jika ada, akan dipindahkan kepada plaintif dengan sepenuhnya (lihat perenggan 53 & 56).]

Notes

For cases on action for damages, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2567–2572.

Cases referred to

Dr Shanmuganathan v Periasamy s/o Sithamharam Pillai [1997] 3 MLJ 61, FC (refd)

Foo Tock Lin v Piong Kew [1962] 1 LNS 38, HC (refd)

Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569, SC (refd)

National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (refd)

Sri Palmar Development & Construction Sdn Bhd v Jurukur Perunding Services Sdn Bhd [2010] 6 MLJ 166; [2010] 8 AMR 460, HC (refd)

Legislation referred to

Contracts Act 1950 ss 24(a), (b), 25, 32, 47

Evidence Act 1950 ss 91, 92

Licensed Land Surveyors Act 1958

Licensed Land Surveyors Regulations 1959 reg 99(1), (2)

Rules of the High Court 1980 O 14A

Lim Chong Fong (James Ding with him) (Azman Davidson & Co) for the plaintiffs.

Tee Han Cheong (Tee & Partners) for the defendant.

Lee Swee Seng JC:

PROLOGUE

[1] This is a sequel to the case of *Sri Palmar Development & Construction Sdn*

Bhd v Jurukur Perunding Services Sdn Bhd [2010] 6 MLJ 166; [2010] 8 AMR 460. There it was an application under O 14A of the Rules of the High Court 1980 ('RHC') by the defendant for the court's determination on the following questions of law:

(a) Whether an agreement on discounted fees for title survey work at RM130,000 or at RM100,000 is in conflict with the Licensed Land Surveyors Act 1958 ('the Act') and regs 99(1) & 99(2) of the Regulations?

(b) In the event that the answer to (a) above is in the positive, whether the agreement on a discounted fee is not valid in law and null and void ab initio under ss 24(a), 24(b) and 25 of the Contracts Act 1950?

(c) In the event that the answers to (a) and (b) above are in the positive, then this action be struck off with cost to be taxed and paid by the plaintiff to the defendant.

[2] I found that there is no legal prohibition against agreeing to a fee lower than the scale fees and so I dismissed the O 14A of the RHC application. It now falls on me to decide if indeed there was an agreement on a discounted fees as alleged by the plaintiff but vehemently denied by the defendant.

PARTIES

[3] The plaintiff is a housing developer and as part of its development of a housing project over a 60 acres land in Tanjung Sepat, Selangor ('the project'), it had to engage the services of the defendant, a licensed land surveyor, for title survey work which was necessary before sub-divided titles to the land could be issued.

PROBLEM

[4] The plaintiff claimed that there was an oral agreement of a lump sum fee which was originally RM100,000 and later revised to RM130,000 for the title survey works for the project. The plaintiff said that the defendant had commenced work with the title survey which resulted in 439 units being issued with qualified titles but that the defendant had breached the said oral agreement in refusing to carry out the survey to cause the issuance of the remaining titles for the project.

[5] The defendant on the other hand maintained that there was simply no such agreement as contended by the plaintiff. The defendant stated that the fees for the title survey work are as set out in the prescribed fees under the Licensed Land Surveyors Act 1958 ('the Act') and the Licensed Land Surveyors Regulations 1959 ('the Regulations'). The defendant further asserted that the

alleged loss and damage suffered by the plaintiff was due to the plaintiff's failure to deposit the requisite sum of prescribed fees to the Land Surveyors Board ('the Board'). The defendant expressed surprise as to how the subdivided titles had been issued for the 439 units and presumably these are concessions given by the land office on account of complaints by purchasers of these low-cost units and also because of initial preparatory works with respect to title survey which the defendant had done for the plaintiff.

PRAYER

[6] The plaintiff claimed damages for repudiatory breach of the oral agreement on fees and had earlier applied for a mandatory injunction that the defendant do issue a letter of release to the plaintiff.

PRINCIPLES

[7] Generally when it comes to two different versions of what happened, the court would tend to lean on the side that has furnished documentary evidence to substantiate its version unless there is strong incontrovertible evidence pointing to the reverse position. This is axiomatic and an approved principle, otherwise any client not happy with a professional's quotation and billing on fees will later raise the defence that there was an oral agreement to a lesser amount and there would be real uncertainty introduced merely because the client said that the written quotation does not say what it says. Imagine the floodgates of disputes and claims arising out of this!

[8] The above approach is necessitated by ss 91 and 92 of the Evidence Act 1950 the relevant parts of which are reproduced below:

> 91 Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.
>
> When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> 92 Exclusion of evidence of oral agreement.
>
> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement

shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

[9] Thompson CJ in *Foo Tock Lin v Piong Kew* [1962] 1 LNS 38 when dealing with the inadmissibility of parole evidence said very aptly that:

> ... if such evidence was admissible then no written contract would ever be accepted by the parties to it as something binding on them because it would be always open to one of them when it suited him to say: 'Well I signed this. I understood it. I signed it consciously but I signed it with the mental reservation that if necessary I would not accept it as binding upon me.' If such evidence were admissible to invalidate a written contract then the whole fabric of our commercial life would fall to the ground.

PAROL EVIDENCE

In 1987: Initial Stage

[10] The plaintiff called as their main witness the managing director of the plaintiff, Mr Koo Hock Chum ('PW1') who had been involved in the project from day one. He is now 80 years. He is an architect by profession. He told the court that the project is a joint venture with the Selangor State Secretariat to construct and develop a special low-cost housing programme initiated by the Selangor State Government. The plaintiff was involved in several phases of the project comprising 942 units.

[11] He also informed the court that before the construction of the buildings, the plaintiff had to do the following:

(a) Technical drawings to be approved by the relevant authorities;

(b) Obtaining the relevant financing and buyers' list;

(c) The settlement of land premiums for lands developed in the project;

(d) Approval of the building plans by the relevant authorities;

(e) Arranging for survey works of the land by a licensed land surveyor.

[12] PW1 said that one Mr Khoo Boo Khean ('DW1'), a close friend of his from the defendant approached him and persuaded him to appoint the defendant to carry out the survey works for the project. DW1 is the chairman of the defendant and a licensed land surveyor.

[13] A discussion was held in his office and according to PW1 a lump sum fee of RM100,000 was agreed upon by DW1 for all the survey works for the

project. PW1 said that he informed DW1 that he did not have enough money to make the advance payment and would only be able to pay the defendant at a later date. According to PW1, DW1 assured him and he agreed to the proposal that should the plaintiff be not in a position to make the payment of fees, the defendant will either itself or cause one of its other companies to pay the fees' deposit to the Land Surveyors Board in compliance with the Land Surveyors Act 1958 where fees have to be paid to the Board before survey work can commence.

[14] I guess a friend in need is a friend indeed! The defendant denied that it was he who approached PW1 for the survey work. His version was that PW1 approached him and requested his company, the defendant, to extend to his firm Akitek Timor a quotation of the survey works to be done for the said project. The defendant through DW1 submitted to the plaintiff by their letter dated 4 September 1987 (*pp 1–4 of agreed bundle of documents B*) stating that they will be completing the field survey, covering the topographical and detail aspects shortly. The defendant also submitted in the said letter the cost estimate for the preliminary surveys and the subsequent title surveys. The breakdown was as follows:

1.0 Demarcation, Topographical and Detail Survey	$ 9,500

2.0 Precomputation and Preparation of Qualified Titles	
2.1 Survey Fees	
2.1.1 Precomputation Fees	
1109 lots @ $ 10 per lot	$11,090
2.1.2 Preparation of qualified titles	
1104 lots @ $ 10 per lot	$11,040
Total:	$22,130

3.0 Block Title Survey	
3.1 Block Title Survey fees	$9,450

4.0 Title Survey	
4.1 Title Survey Fees for Subdivision	$251,735

DW1 denied that there was ever an agreement as to RM100,000 being the lump sum fee.

[15] During the cross-examination of DW1, it was put to DW1 the following:

> 2. QI put it to you that the Plaintiff did not accept this quotation because at all material time, there was this oral agreement with Mr. Koo for an all-in fee of RM100,000.00.

A: No such agreement. *As far as title survey fee is concerned, I am not in the position to change the figure*. If there is any consideration of fees, it will be in topographical survey, preparation of qualified titles and pre- computation works but not in respect of title survey fees. As told by Mr Neo, there is no room for reduction in title survey fees. (Emphasis added.)

[16] However, DW1 conceded that the plaintiff did not accept this defendant's quotation but neither did he reject it. It was conceded by DW1 at the trial that the sum of RM100,000 as fees for title survey was mentioned by the plaintiff. The defendant had maintained that the sums of RM100,000 and RM130,000 was unilaterally asserted by the plaintiff (see notes of proceedings/24 August 2010/6:14:10pm). It was also conceded by the defendant that survey works had even been carried out prior to the issuance of the defendant's quotation on 4 September 1987 (see question 12/p 4/DWS1). DW1 was candid that PW1 neither agreed nor disagreed to the fees quoted. (See notes of proceedings/24 August 2010/6:20:25pm)

[17] It was DW1's evidence that from time to time the defendant did some preliminary survey works and the defendant billed the plaintiff accordingly for RM30,811 which the plaintiff paid RM50,000 leaving a credit balance of RM19,189 (pp 39–50 and 53–57 of B).

Between 1990 and 1995

[18] The issue of survey fees surfaced again in February 1990. The defendant submitted its revised quotations, pp 16 and 21–22 of B. At p 16 of B, it was stated by the defendant in their letter dated 23 February 1990 to Akitek Timor, inter alia, as follows:

> We are pleased to append below the title survey fees prescribed by the Lembaga Jurukur Tanah to carry out the title survey for the lots as follows:
>
> :
>
> :
>
> 950 lots
>
> RM219,245.00
>
> Kindly issue a cheque or bank draft payable to Lembaga Jurukur Tanah for the above amount to enable us to apply to Survey Department for the new lot numbers.

[19] There was then another letter from the defendant dated 3 July 1991 this time addressed to the plaintiff for the attention of PW1 (pp 21–22 of B). This time the fees had been revised downward to RM218,715 because the lots to be surveyed was reduced from 950 to 948. Again there was the instruction at the

end of the letter that the plaintiff was to issue a cheque or bank draft payable to Lembaga Jurukur Tanah for the amount to enable the defendant to apply to the survey department for the new lot numbers.

[20] Then came the plaintiff's letter of 18 November 1992 (p 24 of B) signed by PW1 where the plaintiff tried to cement and concretise the agreement of RM130,000 as the survey fees in a letter to the defendant that reads:

> With reference to our above project, I write to inform you that we are re-commencing our first Phase development work which consists of 116 units of low cost houses as shown coloured in the attached key plan.
>
> Would you please immediately proceed to peg out the lots concerned ready for handing over the site to the new contractor to commence construction work when contract is signed next week.
>
> As agreed earlier, this forms part of your lump sum professional fees of RM130,000.00.

[21] This was met with an immediate reply from the defendant in its letter dated 24 November 1992 (p 26 of B) through one Mr Yee Shin Cheong, a licensed surveyor who is a director of the defendant, which letter, inter alia, states:

> We had previously agreed to the title survey fees, *which is not $130,000* and that when the title survey is being conducted it would be 'at one go', and not piece meal as is being proposed to be done now.
>
> However, we are prepared to help you, and will be mobilising a field party as soon as possible. The lots to be surveyed we'll discuss further. Thank you very much. (Emphasis added.)

[22] It appears to me that up until this stage in November 1992 both the plaintiff and the defendant had not agreed on the fees for the survey works. plaintiff asserted that it was initially agreed at RM100,000 and later revised to RM130,000 but the defendant insisted that there was a quotation first given in September 1987 and later reiterated again in defendant's letter of 23 February 1990 and revised downward again in their letter of 3 July 1991 and re-clarified again in their letter of 24 November 1992. Defendant also tried to bolster their position by stating in their letter of November 1992 to the plaintiff that '... *We had previously agreed to* the title survey fees, which is not $130,000. …' (Emphasis added.)

[23] I can only say that here we see a tussle between a client who wants a higher profit margin for his project by negotiating a lower fee and a professional who wants the benefit of monopoly of a scale fee but fearing that if he presses too hard he might lose the opportunity to bill for any fees at all for the survey

works might be given by the plaintiff to someone who can quote lower. The only way out of this rigmarole and the risks involved in a kind of *wayang-kulit* is to be forthright and say what we are afraid to say:

> Here is my quote according to the standard scale fees prescribed by my professional body. If you are agreeable, sign here and make the payments to Lembaga Jurukur Tanah and once that payment is made we shall start work immediately. Indeed until payment is made to the Lembaga we cannot and are not allowed to start work.

[24] Any other methods devised to circumvent the prescribed procedure for paying under a standard scale fee structure under the paternalistic patronage of the Land Surveyors Board would expose one to the risks of not being able to prove an otherwise agreed fees against the preponderance of paper documents citing prescribed fees.

[25] The plaintiff submitted that whatever the ambiguity might have been, this was put to rest by the defendant's letter dated 23 November 1995 (p 52 of B) where at the first paragraph it states:

> Your letter dated 17th November 1995 referred. We would like to clarify your statement all-in survey fee for the above shall be *RM130.00 (now by consent corrected to RM130, 000.00)*. This figure related only to 'title survey' only and does not include the typographical survey carried out in 1987 and preparation of RS plan and Qualified Title. *In other words, this figure is in place of the amount required to deposit with the Land Surveyors Board*. (Emphasis added.)

[26] By this critical letter which was accepted by the plaintiff (see question 18/p 7/PWS1), the plaintiff's counsel submitted that it is conclusive that there was the oral agreement between the parties that the defendant would carry out the title survey at the lump sum fee of RM130,000 and not the fee as per the Regulations. The plaintiff's counsel continued that by this agreement, it also meant by implication that the fee of RM219,245 required to be deposited with the Board by the plaintiff has to be refunded by the defendant to the plaintiff when the defendant received his fees from the Board.

[27] When it was put to DW1, DW1 answered as follows (see notes of proceedings/24 August 2010/6:41:11pm):

> Your Honour, this letter *obviously carry a lot of mistakes and blunder*, I would say. … You have to look at circumstances when Mr Yee had signed this. His wife was stricken with cancer. (Emphasis added.)

[28] The plaintiff's counsel submitted that Mr Yee, the author of this critical letter, was not around to testify nor was this circumstances mentioned in DWS2. Although DWS2 was admitted in evidence, the defendant failed

and/or neglected to produce Mr Yee as witness to testify thereby depriving the plaintiff to cross-examine him. In consequence, the plaintiff's counsel concluded that DWS2 should be discarded or that otherwise little weight ought to be placed thereon, see *Dr Shanmuganathan v Periasamy s/o Sithamharam Pillai* [1997] 3 MLJ 61, at pp 77–79.

[29] More importantly, the plaintiff submits that the defendant had made no attempt at all material times thereafter to correct the letter dated 23 November 1995 (p 52 of B) nor was there evidence led to show that the 'mistakes and blunder' were corrected. For DW1 to assert in this court, after a lapse of 15 years, that the aforesaid letter is full of 'mistakes and blunder' is clearly an afterthought to resile from the oral agreement.

[30] However, this court takes the view that this letter of 23 November 1995 should be looked at in its proper perspective and proportion. It is not so much a Freudian slip as it is an aberration in the vast array of letters alluding to the fees as prescribed and quoted. It is more a case of a swallow does not make a summer.

[31] PW1's evidence on the alleged existence of oral agreement of title survey fee of RM130,000 with DW1 and Yee Shin Cheong on 17 November 1995 is not corroborated by the evidence of the substantial witness Mr Lim Lian Toong who was allegedly present in the meeting as he was not called to testify. PW1's evidence is a unilateral declaration of the existence of such meeting. Further the plaintiff's letter of 17 November 1995 issued on the same day as the date of the purported meeting of the same day, on the face of it has failed to state there was such a meeting taking place and neither did the letter confirm all the terms of agreement allegedly reached in the said meeting. The argument in *Dr Shanmuganathan*'s case applies equally to the plaintiff who failed to call Mr Lim Lian Toong who according to the plaintiff was at the meeting with Mr Yee.

[32] The court accepts the explanation of DW1 that Mr Yee Shin Cheong is currently undergoing treatment for cancer in Australia and could not come back from in time for the trial.

[33] Interestingly this so-called crucial and critical letter of 23 November 1995 which is said to evidence the oral agreement of RM130,000 as being the overall fees for survey works was never referred to at all in the subsequent letters of both the plaintiff and the defendant. If indeed it was so crucial and critical as having the effect of ceasing all conflicts on fees it was strangely not referred to at all when the defendant reminded the plaintiff of the full deposit to the Land Surveyors Board. I take it that parties did not mean the said letter to bear the meaning of an agreed fees of RM130,000 and hence no referral to it by the

plaintiff who has no hesitation to refer to the figure in previous correspondence so as to induce the defendant to somewhat and somehow agree to it.

[34] If indeed there was the agreement on RM130,000 as fees then the logical question to ask is: did the plaintiff follow through with payment to the Land Surveyors Board having secured a good deal and discount on fees? There was no payment of RM130,000 made and it was not until some five years later that the plaintiff issued a cheque for the sum of RM200,056 to the Land Surveyors Board vide their letter of 28 September 2000 to the defendant. As there was an earlier sum of RM19,189 standing to the credit of the plaintiff, this together with the sum of RM200,056 would make the total of RM219,245 as per the quote of the defendant vide their letter dated 23 February 1990 at p 16 of B.

[35] Does it mean that the parties considered themselves no longer bound by their agreement in the letter of 23 November 1995? No questions were led on this as to why only a sum of RM130,000 was to be made to the Board, and not the sum is as per the earlier quote vide letter of the defendant dated 23 February 1990.

[36] When questioned under re-examination as to why the plaintiff did not confirm the alleged initial oral agreement of a lump sum fee of RM100,000, PW1 said that he did not want to put the defendant in trouble. However, when it comes to the alleged agreed fee of RM130,000, PW1 acted inconsistently by issuing letters openly to confirm there was such an agreement (refer pp 24 and 51 of B) when in fact there was no such agreement. It does reflect on the character of PW1 that money is more important than friendship and that he has no compunction in getting his good friend into problem with his Land Surveyors Board.

Post 2000

[37] The plaintiff had another opportunity to refer to the letter of 23 November 1995 in response to the revising of the quotation of fees to be deposited to the Land Surveyors Board (pp 58–60 of B) amounting to RM592,420.92. The said letter dated 31 May 1999 stated, inter alia:

> Reference to our conversation, we are requested to forward the calculation of survey fees to you again to enable you to make the necessary payment for deposit to the Lembaga Jurukur Tanah.
>
> Previously we had made the calculation based on the rates approved by the Board in 1980. On the 1st May 1997 a new scale of fees for title surveys was gazetted. As the survey fees previously quoted was not deposited with the Land Surveyors Board, the new rate of fees applies.
>
> Forwarded herewith are the following:
>
> (i) Copy of the new rates of Survey Fees i.e. Table 1 of the Thirteenth Schedule (Regulation 99) Scale of fees for Title Survey.

(ii) Appendix 'SP'

This shows the calculation of the survey fees based on the new rates. These fees are to be paid to Lembaga Jurukur Tanah to carry out the title surveys. Therefore kindly forward to us a Bank Draft for *RM592,420.92* in favour of Lembaga Jurukur Tanah for our onward transmission to them.

[38] Upon receipt of that letter on the revision upwards because of the revision upwards of fees by the Land Surveyors Board, the plaintiff could have written back and said:'Look here. You have agreed to RM130,000 as a lump-sum fee and I don't care what your Board says. An agreement is an agreement.'

[39] Apparently the title survey fee was revised upwards because of the amendment to the Act and Regulations by Parliament vide Federal Government *Gazette* PU(A) 167 dated 1 May 1997.

[40] I can only say that even if there had been an oral agreement on fees of RM130,000 the parties considered themselves as no longer bound by it after five years. In any event the condition on payment of RM130,000 to the Board was not forthcoming.

[41] I agree with the defendant's counsel's submission that even assuming for a moment that there was an agreement reached on a lump sum survey fees of RM130,000, the condition of the payment of RM130,000 to the Board was not fulfilled within a reasonable time with the consequence that the defendant is released from its obligation to carry out title survey works both because the said sum was not deposited with the Board and that the agreement on fees was understood to be acted upon timeously. As authority one can refer to the Federal Court case of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 where it was held that the requirement for FIC approval belongs to the category of contingent conditions the non-fulfilment of which negates the existence of any contractual relationship between the parties to complete the agreement. By extension, it was submitted by the defendant's counsel that the requirement to deposit the prescribed title survey fee or whatever may be the agreed fee with the Board as required by the Act and Regulations is a legal requirement and belongs to the category of contingent conditions the non-fulfilment of which will negates the existence of any contractual relationship between the parties to complete the agreement.

[42] Section 32 of the Contracts Act 1950 defines 'contingent contract' as:

A 'contingent contract' is a contract to do or not to something, if some event, *collateral to the contract*, does or does not happen.

[43] I find merits in the defendant's submission that if there was such an agreed fee of RM130,000 its performance by the defendant to carry out title survey work is collateral to the plaintiff also fulfilling the legal requirement of depositing the prescribed title survey fee with the Board which the plaintiff failed to do in the present case within a reasonable time.

[44] One may also refer to s 47 of the Contracts Act 1950 where it is stated as follows:

> 47 Time for performance of promise where no application is to be made and no time is specified
>
> Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation – The question 'what is a reasonable time' is, in each particular case, a question of fact.

[45] Further, the defendant contended that there is no binding contract to do title survey works for the project if the condition that is required by the law of the plaintiff as the client to deposit the prescribed fees to the Board is not first satisfied as provided for by the Act and Regulations which states:

Rule 99(1) of the Regulations: 'Land surveyor in making title survey shall charge fees as prescribed in the Thirteenth Schedule'

Rule 99(2) of the Regulations:'*fee shall be deposited with the Board by the client before the title survey is carried out*.' (Emphasis added.)

[46] It is the defendant's conviction and contention that as the licensed land surveyor, it will not under whatever circumstances carry out the title survey works unless its client, the plaintiff, has deposited the prescribed fees with the Board as required by the law ie the Act and Regulations. As the plaintiff did not deposit the prescribed fees with the Board at the material times, the defendant would not carry out the title survey.

[47] I agree that the alleged repudiatory breach of contract by the plaintiff is misconceived as there is no contract in existence for the defendant to breach.

[48] It is to be noted that when the plaintiff finally deposited the sum of RM219,245 for title survey fee to be paid to the Board (pp 66 of B) and not the sum of RM130,000 the plaintiff merely said that the deposit of RM219,245 to be made to the Board is '... NOT in accordance with what we had verbally agreed at the outset' when the plaintiff could have stated that by your letter of

November 23 1995 your Mr Yee Shin Cheong had agreed on your behalf to charge only RM130,000. Hence this court finds that at best the said letter is equivocal.

[49] Subsequently on 28 September 2000 (pp 69–70 of B) the defendant submitted another revised quotation resulting more from the increase in the number of party walls to be surveyed from 608 to 687 thus making the amount now payable to the Board as RM603,781.92.

[50] There was no response in writing from the plaintiff to this revised quotation and no reference to the so-called agreement on lump-sum fees of RM130,000 as evidenced in letter dated 23 November 1995. Indeed the actual payment of the said sum of RM219, 245 to the Board was only finally made by the plaintiff on 22 May 2001 (refer p 91 of B) because of some technicalities with respect to stale cheque given by the plaintiff to the defendant for onward transmission to the Board.

[51] I agree with the defendant's counsel that there are no express statements of agreed title survey fee of RM130,000 in all those letters between the parties with the exception of the defendant's letter of 23 November 1995 which the defendant admitted was erroneously prepared.

[52] It is also pertinent to note that in the letter of demand dated 16 May 2002 and 22 May 2002 from the plaintiff's solicitors Azman Davidson & Co to the defendant, no reference was made to the so-called crucial and critical letter of the defendant to the plaintiff dated 23 November 1995 evidencing the agreed fees of RM130,000.

[53] I however find that there is some element of self interest and bad faith in that the defendant refused to carry out the title survey work until and unless the plaintiff had deposited the revised sum of RM603,781.92 and at the same time the defendant would not resign and issue the letter of release to the plaintiff to appoint other surveyor.

[54] By reason that the defendant continued to refuse to issue the letter of release, the plaintiff had to apply to court and obtained a mandatory injunction to compel the defendant to do so on 19 September 2003.

[55] However, the plaintiff had to pay RM83,658.37 into court being part of the compensation of RM115,006.08 demanded by the defendant (p 117 of B).

[56] Being a professional, the proper conduct would be to discharge oneself if one's client cannot agree on the fees. The defendant has acted unreasonably

and is not entitled to any claim of fees for work done which it is not supposed to have commenced any way without the deposit of the fees with the Board. In any event the defendant had not billed the plaintiff for the fees and no evidence has been adduced by the defendant on the value of work done. What is more important is that there has not been any counterclaim filed by the defendant.

[57] Thereafter, the plaintiff engaged Ukur Gemilang to carry out and complete the title survey work which the plaintiff paid RM291,883.32 (questions 31 and 32/p 11/ PWS1 and question 4 and 5/p2/PWS2).

[58] The testimony of PW2 Mr Neo Kim Hock, the principal of Ukur Gemilang, must be taken with a pinch of salt. He said that his quote for the survey works was RM451,366.44 and that PW1 could only pay him RM291,883.32. So he said he advanced the balance sum to the Board as a loan to PW1. Indeed according to PW2, PW1 is still repaying him back the loan and that it is almost paid in full.

[59] I must confess I find it hard to believe that. If indeed the plaintiff had paid RM451,366.44 as fees, it would be claiming the difference between that and the sum of RM130,000 but instead the plaintiff is only claiming the difference between RM291,883.32 and RM130,000 which gives a mere RM161,883.32. (See *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 at p 581).

[60] PW2 instead of helping the plaintiff's case actually casts more doubt on the veracity of the plaintiff's claim. Such testimony reflects poorly on both PW1 and PW2.

[61] DW1 stated under re-examination that the Board made an exception to accept the part-payment of title survey fee of RM219,245 on 22 May 2001 after the defendant had shown the Board the minutes of the meeting with the officials of the State Government, Ministry of Housing and house buyers.(See p 91 of B)

[62] As a responsible developer, it is expected of the plaintiff to deposit the said sum of RM219,245 to the Board within a reasonable time to enable the defendant to commence title survey works and to procure issuance of titles from the land office speedily. By not doing so, it is incredible for the plaintiff to claim now that the defendant did not honour the alleged oral agreement of title survey fee of RM130,000 purportedly concluded on 23 November 1995 and wants to hold the defendant responsible for it. Had the plaintiff paid the sum of RM219,245 to the Board in 1995 immediately after the alleged confirmed agreement of 23 November 1995, it would not be caught by the amendment to

the Act and Regulations by the Parliament vide Federal Government *Gazette* PU(A) 167 dated 1 May1997 that came in two years later.

[63] It was also admitted by PW1 under cross-examination that the plaintiff only paid the land premium in 2000 even though it had commenced development in 1987; a delay of 13 years. I accept the defendant's contention that no proper survey work can be done until the land premium is paid or at the very least no individual sub-divided titles can be issued.

[64] The defendant's counsel also uncovered a reason for the delay in paying the land premium to the relevant authority and the survey fees to the Board during the cross-examination of PW1. It was that the plaintiff as a developer has been charging the purchaser between RM1,500 to RM2,000 as consent fees for consenting to transfer of the purchaser's unit in a sub-sale transaction and that it was only after complaints by purchasers to the Housing Ministry that the Housing Ministry told them that they can only charge a reasonable fee of RM500.

[65] As the defendant had refunded the plaintiff the amount paid to the Board less the sum of RM20,880.47 which is some 10% of the Board's administrative charge which the Board had deducted at source, I hold that if the plaintiff is not satisfied with this then its action should be against the Board for the shortfall.

[66] One observation I must make of PW1 was that he did not at all descend to the mechanics of refund which he said DW1 had agreed on the excess fees in excess of RM130,000. Being an astute businessman that I find him to be, he would at least have asked for a post-dated cheque from DW1 or perhaps a credit-note for the amount of the excess or even did what he did to PW2, which is that he should have asked DW1 to advance the difference which he said initially that that was the assurance that DW1 gave him at the outset when they talked about the possible engagement of the defendant to do the survey works. Are we to assume that such an important thing as the mechanics of refund was never discussed? Would it not be more probable than not that there was no such agreement in the first place?

PRONOUNCEMENT

[67] Based on the totality of the evidence adduced I find that there was no agreement on RM130,000 as a lump-sum survey fees proved on a balance of probability. Even if there had been, the condition of payment of the sum of RM130,000 to the Land Surveyors Board was not complied with within a reasonable time. The plaintiff's claims are hereby dismissed. I find the defendant's conduct of not agreeing to be discharged had been unreasonable in

the circumstances. As such the sum of RM83,658.37 deposited with the court including interest if any is to be refunded to the plaintiff in full. Bearing in mind the conduct of both the plaintiff and the defendant, I made no order as to costs.

POSTSCRIPT

[68] Both PW1 and DW1, the main protagonists in this sad episode over dispute on professional fees have advanced in age since the dispute started in 1995. They are now both 81 and 72 years old respectively. They both started as good friends. It is sad to see friends ending up in court as foes. Age they say has a way of mellowing the exuberance and perhaps even excesses of younger days. Perhaps as they ponder on the perplexities of life with its paradoxes they may once again realise that friendship is more important that fees and that we are not the poorer by not insisting on what we should rightly be ours.

Plaintiff's claim dismissed with no order as to costs.

Reported by Kohila Nesan